No. 06-457

OCT 25 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

G. STEVEN ROWE, In His Official Capacity as Attorney General of the State of Maine,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR *AMICUS CURIAE* TOBACCO CONTROL LEGAL CONSORTIUM, CAMPAIGN FOR TOBACCO-FREE KIDS, AMERICAN LUNG ASSOCIATION, AND AMERICAN CANCER SOCIETY IN SUPPORT OF STATE OF MAINE PETITION FOR A WRIT OF CERTIORARI

MATTHEW MYERS *
Campaign for Tobacco-Free Kids
1400 Eye Street
Suite 1200
Washington, D.C. 20005
(202) 296-5469

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
ARGUMENT	2
I. TOBACCO USE PRESENTS A PUBLIC HEALTH CRISIS OF UNPRECEDENTED PROPORTIONS	2
II. REDUCING THE AVAILABILITY OF TOBACCO THROUGH RESTRICTIONS ON INTERNET PURCHASES WILL REDUCE TOBACCO USE AMONG MINORS	4
III. THE FIRST CIRCUIT'S DECISION UNREASONABLY RESTRICTS MAINE AND OTHER STATES FROM CONTROLLING YOUTH ACCESS TO TOBACCO	7
A. Application of the First Circuit's Decision Nationwide Will Affect Laws Similar To Maine's Across the Country	8
B. States Should Be Allowed To Regulate Where the Federal Government Refuses To	15
STATEMENT OF INTEREST OF *AMICUS CURIAE*	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Brown & Williamson Tobacco Corp. v. Food & Drug Admin., 153 F.3d 155 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000) 15
Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 3, 13
Granholm v. Heald, 544 U.S. 460 (2005) 13
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 15
N.H. Motor Transp. Ass'n v. Rowe, 448 F.3d 66 (1st Cir. 2006) 9, 10, 11

STATUTES

Federal

15 U.S.C. §§ 375-378 12
42 U.S.C. § 300x-26(b)(1) 4, 12, 15
49 U.S.C. § 14501(c)(1) 9
49 U.S.C. § 14501(c)(2)(C) 9
49 U.S.C. § 14501(c)(3) 9
49 U.S.C. § 41713(b)(4)(A) 9
49 U.S.C. § 41713(b)(4)(B) 9
Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 106, 108 Stat. 1569, 1605 ..... 8, 9
Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899 9

State

720 Ill. Comp. Stat. Ann. §§ 678/5, 678/10, 678/99 14
2003 Me. Legis. Serv. Ch. 444 7
Alaska Stat. § 43.50.105 14
Ariz. Rev. Stat Ann. § 42-3225(A)(2) 13

TABLE OF AUTHORITIES—Continued

	Page
Cal. Bus. & Prof. Code § 22963	14
Conn. Gen. Stat. Ann. § 12-285c	14
Del. Code. Ann. tit. 30, § 5365(a)(2)	13
Idaho Code Ann. § 39-5701 *et seq.*	14
Ind. Code Ann. § 24-3-5-5(a)	13
Kan. Stat. Ann. § 79-3333	14
La. Rev. Stat. Ann. § 47:874(A)(2)	13
Me. Rev. Stat. Ann. tit. 22, § 1555-C(1)	8
Me. Rev. Stat. Ann. tit. 22, §§ 1555-C(3)(B), 1555-D	8
Me. Rev. Stat. Ann. tit. 28-A, §§ 2073, 2077	11
Me. Rev. Stat. Ann. tit. 8, §§ 221 *et seq.*	12
Me. Rev. Stat. Ann. tit. 17-A, § 1001(a)(B)	12
Md. Code Ann., Bus. Reg. § 16-223	14
Mich. Comp. Laws Ann. § 205.431	14
Mo. Ann. Stat. §§ 407.925 *et seq.*	14
Nev. Rev. Stat. Ann. § 202.24935	14
N.Y. Pub. Health Law § 1399-11	14
Okla. Stat. Ann. tit. 68, § 317.4(A)(2)	13
Or. Rev. Stat. Ann. § 323.718(1)(b)	13
R.I. Gen. Laws. § 11-9-13.11 *et seq.*	14
Tenn. Code Ann. § 39-17-1504(d)	14
Tex. Health & Safety Code Ann. § 161.455(a)(2)	13
Utah Code Ann. § 76-10-105.1	13
Va. Code Ann. § 18.2-246.10(2)	13
Wash. Rev. Code Ann. §§ 70.155.010 *et seq.*	14
W. Va. Code Ann. § 16-9E-4(a)(2)	13

OTHER AUTHORITIES

Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs* (August 1999)	12

TABLE OF AUTHORITIES—Continued

	Page
Frank J. Chaloupka et al., *Prices, Policies and Youth Smoking*, 98 Addiction S1 (May 2003)...	5
H.R. Conf. Rep. No. 103-677	8
Jennifer B. Unger et al., *Are adolescents attempting to buy cigarettes on the internet?*, 10 Tobacco Control 360 (2001).....	6
Kurt M. Ribisl et al., *Brief Report: Internet Sales of Cigarettes to Minors*, 290 Journal of American Medicine 10 (Sept. 10, 2003).....	6, 7
National Household Survey on Drug Abuse, *How Youths Get Cigarettes* (Nov. 22, 2002)	5
Robert Rubin et al., *Online Tobacco Sales Grow and States Lose*, Forrester Research, Inc. (April 27, 2001)	5, 7
Sara M. Abrams et al., *Internet cigarette purchasing among ninth-grade students in Western New York*, 36 Preventative Medicine 731 (2003).....	5, 6
Thomas Friedman, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY, *Flattener #8. Insourcing, What the Guys in the Funny Brown Shorts are Really Doing* 141-50 (2005)	11
U.S. Department of Health & Human Services, Center for Disease Control and Prevention, *Pathways to Freedom: Winning the Fight Against Tobacco* (1992).....	4
U.S. Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General* (2004)	2, 3
U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006)	3

TABLE OF AUTHORITIES—Continued

Page

U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: Report of the Surgeon General* (1994) 3

U.S. Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* (2000) 4

U.S. General Accounting Office, Report to Congressional Requestors, *Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement* (August 2002) 12

IN THE

Supreme Court of the United States

No. 06-457

G. STEVEN ROWE, In His Official Capacity as Attorney General of the State of Maine,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR *AMICUS CURIAE* TOBACCO CONTROL LEGAL CONSORTIUM, CAMPAIGN FOR TOBACCO-FREE KIDS, AMERICAN LUNG ASSOCIATION, AND AMERICAN CANCER SOCIETY IN SUPPORT OF STATE OF MAINE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE* [1]

Four entities with significant interest in and expertise on legal issues surrounding tobacco control in the United States

[1] Counsel for the parties took no part in preparing this brief. No person or entity except listed *amicus curiae* contributed financially to the production of this brief. All parties consented in writing to the submission of this brief.

have joined to submit this brief: the Tobacco Control Legal Consortium, the Campaign for Tobacco-Free Kids, the American Lung Association, and the American Cancer Society. A full description of each *amicus* and its interest in this case is presented at the end of this brief.

ARGUMENT

The enormity of the public health crisis caused by tobacco use in the United States instigates state and local governments to take action to reduce smoking prevalence, especially among youth. Given the profound need for such regulation, federal restraint on state and local government regulation in this area should be narrowly construed. The First Circuit Court of Appeals' overly broad and unreasonable application of the federal preemption provision of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") not only strikes down an important statute for the State of Maine, it creates an unnecessary shadow over similar efforts to control tobacco distribution in other states. This overreaching unnecessarily impairs state efforts that have been encouraged and condoned by the federal government; reversal is necessary, therefore, *certiorari* is appropriate.

I. TOBACCO USE PRESENTS A PUBLIC HEALTH CRISIS OF UNPRECEDENTED PROPORTIONS.

The dimensions of the public health crisis presented by the use of tobacco in the United States cannot be understated. Tobacco use continues to be the leading preventable cause of death in the United States. *See* U.S. Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General* (2004). Each and every year, tobacco use results in nearly 450,000 deaths and health-related costs of $156 billion. *Id.* The dangers associated with the use of tobacco extend beyond the damage done to the

health of the user; an estimated 60% of non-smokers in the United States have been impacted by secondhand, or environmental, tobacco smoke. *See* U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006). The catalog of disease and illness caused by smoking or secondhand smoke exposure continues to expand, as will the continued damage to our economy and public health.

Because of the continued and varied dimensions of this public health dilemma, the Surgeon General of the United States has issued 29 reports detailing the enormous risk posed by tobacco use. *Id.* The most recent report that examines the impact of smoking on primary users concluded that smoking has a harmful impact on nearly every bodily organ. *See* U.S. Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General* (2004). Most important, the report expanded the list of diseases previously identified as being caused by smoking to include abdominal aortic ancurysms, acute myeloid leukemia, cataracts, cervical cancer, kidney cancer, pancreatic cancer, pneumonia, periodontitis, and stomach cancer. *Id.*

There is no doubt that the molecular and cellular damage caused by tobacco is only exacerbated by the onset of tobacco use in early adolescence. *See* U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994). "The [Food & Drug Administration] has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). The long-term effects of tobacco use begin in youth smokers; nearly all first-time tobacco use begins prior to high school graduation. The commencement of smoking in adolescence

results in a longer period of exposure and heavier use during adulthood. In an attempt to curtail youth access to tobacco products and thereby reduce youth smoking prevalence, the State of Maine passed legislation regulating the sale of tobacco via the Internet and mail or phone order venues.

II. REDUCING THE AVAILABILITY OF TOBACCO THROUGH RESTRICTIONS ON INTERNET PURCHASES WILL REDUCE TOBACCO USE AMONG MINORS.

Reducing youth access to tobacco products has been an integral component of many state and local governments' efforts toward reducing adolescent tobacco use. *See* U.S. Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* (2000). Indeed, the federal government all but requires states to enact youth tobacco sales restrictions and to enforce those restrictions in some manner. *See* 42 U.S.C. § 300x-26(b)(1) (conditioning state substance abuse funds on achieving certain goals to reduce youth tobacco sales).[2] There is evidence that the best predictor of tobacco experimentation among adolescents is the perception of ready access.[3] Consistent with that evidence is data demonstrating that attempts to limit youth access are generally ineffective when piecemeal; the best

---

[2] Interestingly, federal law does not establish a minimum age for the purchase or use of tobacco and, of course, does not establish penalties for retailers who sell tobacco to minors.

[3] *See* United States Department of Health & Human Services, Center for Disease Control and Prevention, *Pathways to Freedom: Winning the Fight Against Tobacco* (1992) (available at http://www.cdc.gov/tobacco/quit/pathways.pdf) (last visited October 9, 2006).

approach is a comprehensive scheme that stresses enforcement of retailer compliance with minor access laws.[4]

The Internet has become an increasingly popular destination for minors seeking to purchase products they cannot buy readily in brick-and-mortar retail establishments. Due to age restrictions and state and local enforcement of those restrictions, tobacco is one such product. Although studies show that Internet purchases comprise a smaller percentage of youth tobacco sales than do traditional commercial sources, there is evidence that minors are aware of the potential of the Internet as a source for illicit tobacco purchases—an avenue that presents fewer obstacles than the typical convenience store, gas station, or vending machine.[5] Internet sales to adolescents will likely increase as retail access becomes an increasingly difficult proposition for minors.[6]

That youth perceive the Internet to be an avenue of ready access to tobacco is validated by recent studies of youth smokers in California and New York. The California study examined tobacco access patterns of California high school sophomores and seniors in the 1999-2000 school year, while the New York study focused on the Western New York ninth grade population.[7] Both studies showed that Internet tobacco

---

[4] *See* Frank J. Chaloupka et al., *Prices, Policies and Youth Smoking*, 98 Addiction S1 (May 2003).

[5] *See* National Household Survey on Drug Abuse, *How Youths Get Cigarettes* (Nov. 22, 2002) (available at http://www.oas.samhsa.gov/2k2/YouthCigs/YouthCigs.pdf) (last visited October 9, 2006).

[6] In fact, the sale of cigarettes via the Internet to all consumers is growing. *See* Robert Rubin et al., *Online Tobacco Sales Grow and States Lose*, Forrester Research, Inc. (April 27, 2001) (available at http://www.forrester.com/ER/Research/Brief/Excerpt/0,1317,12253,00.html) (last visited October 17, 2006).

[7] *See* Sara M. Abrams et al., *Internet cigarette purchasing among ninth-grade students in Western New York*, 36 Preventative Medicine 731

purchases accounted for between 2.0% to 2.5% of tobacco purchases by study participants.[8] In the New York study, proof of age was requested of only 30% of Internet purchasers, and youth aged 14 and under were "significantly more likely to report using the Internet to purchase cigarettes."[9] Of the participants in the California study who reported ever having used the Internet to attempt to purchase cigarettes, 32% had made their most recent purchase through that medium.[10]

As savvy "cyber-shoppers," adolescents will likely turn to the Internet more frequently as a source of tobacco. Participants in the New York study indicated that 9% of current youth smokers intended to purchase cigarettes over the Internet within the year following the study.[11] As youth access to the Internet grows—at home or at school, through laptops or cell phones—minors will more readily and more frequently circumvent state and local sales restrictions by purchasing online. And online retailers willing to sell to kids will continue to provide that opportunity. A 2003 study of the proportion of Internet cigarette vendors that would sell cigarettes to minors resulted in overwhelming evidence that minors face little or no difficulty in purchasing cigarettes online.[12] In that study, Internet cigarette vendors sold cigarettes to minors in 92% of attempted purchases.[13] Of the successful purchases made by adolescents, the age of the

---

(2003); Jennifer B. Unger et al., *Are adolescents attempting to buy cigarettes on the internet?*, 10 Tobacco Control 360 (2001).

[8] *See* Abrams, *supra* note 7; Unger *supra* note 7.

[9] *See* Abrams, *supra* note 7, at 732.

[10] *See* Unger, *supra* note 7, at 361.

[11] *See* Abrams, *supra* note 7, at 731.

[12] *See* Kurt M. Ribisl et al., *Brief Report: Internet Sales of Cigarettes to Minors*, 290 Journal of American Medicine 10 (Sept. 10, 2003).

[13] *Id.*

purchaser was never verified by the vendor.[14] Most disturbing, vendors included complimentary cigarette packs and samples, as well as promotional items and ordering information that the vendor suggested should be passed on to new customers.[15]

The need for regulation and enforcement of Internet tobacco sales is a clear imperative if the public health crisis that tobacco use represents is to be managed and eliminated; and the states are willing and able to impose appropriate restrictions like those in Maine's statute. The long-term effects of tobacco use are made more profound when tobacco use begins in the youth population. The danger that the Internet poses as a new and anonymous source for minors to purchase tobacco products in contravention of legal age restrictions cannot be ignored, and must be addressed. The State of Maine recognized this imperative when enacting the tobacco delivery law at issue here.

III. THE FIRST CIRCUIT'S DECISION UNREASONABLY RESTRICTS MAINE AND OTHER STATES FROM CONTROLLING YOUTH ACCESS TO TOBACCO.

The First Circuit Court of Appeals ruled that Maine's tobacco delivery law[16] was preempted by the FAAAA. The decision severely and unnecessarily restricts Maine from regulating direct Internet or telephone sales of tobacco. Further, the decision threatens laws in other states that regulate the delivery of tobacco and other dangerous

---

[14] *Id.*

[15] *Id.* In addition, because most Internet sellers are operating outside the tax scheme, *see* Rubin, *supra* note 6, they are able to offer lower-priced cigarettes, a further enticement to price-sensitive consumers like kids.

[16] Me. Pub. L. 2003, c. 444; *see also* 2003 Me. Legis. Serv. Ch. 444 (West).

substances. This Court should grant *certiorari* and reverse the First Circuit, reinstating state and local power in this area.

A. Application of the First Circuit's Decision Nationwide Will Affect Laws Similar To Maine's Across the Country.

Maine's tobacco delivery law imposes three requirements on tobacco retailers. First, the law requires that retailers selling tobacco over the Internet obtain age verification before selling tobacco to a consumer. *See* Me. Rev. Stat. Ann. tit. 22, § 1555-C(1) (West 2004). Second, the package in which the tobacco is sent must be clearly marked and identifiable as containing a tobacco product. *See id.* at § 1555-C(3)(B). Third, the retailer must choose a delivery service (or carrier) that provides age verification and signature services at the end destination. The law allows for the punishment of a carrier who knowingly transports a package in violation of the Maine delivery law. Carriers "may not knowingly transport . . . a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State . . . ." *Id.* § 1555-D. Thus, the law provides a mechanism by which Maine can ensure that tobacco products purchased through the Internet or telephone do not reach minors and are not being sold in the state by unlicensed tobacco retailers.

The FAAAA[17] was passed by Congress in 1994 to prevent states from engaging in economic regulation that would eliminate non-uniform air and motor carrier operations. *See* H.R. Conf. Rep. No. 103-677, at 85-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60. The first relevant provision provides that a state may not enact a law "related to a price, route, or service of an air carrier . . . when such carrier is transporting property by aircraft or by motor

---

[17] Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605 (1994).

vehicle." Pub. L. No. 103-305, § 601(b)(1), codified at 49 U.S.C. § 41713(b)(4)(A). Second, the FAAAA prevents states from passing a law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Pub. L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(1), now codified at 49 U.S.C. § 14501(c)(1). Finally, Congress exempted from both of these provisions the "safety regulatory authority of a State with respect to motor vehicles," including regulation of hazardous cargo, insurance requirements, or household goods. Pub. L. No. 103-305, § 601(b)(1), codified at 49 U.S.C. § 41713(b)(4)(B).[18]

Congress intended to preempt state regulation of motor carriers only when such regulation was designed to control or manipulate carrier costs, not when such regulation imposes requirements only on non-carrier third parties, such as Internet tobacco vendors. Tobacco regulation designed to protect the public health, particularly the youth access restriction at issue here, does not fall within the preemption provision. Yet the First Circuit interpreted the "related to" language of the FAAAA broadly, resulting in the preemption of Maine's tobacco delivery law. *See N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 75-78 (1st Cir. 2006). According to the First Circuit, by requiring tobacco retailers to choose a carrier that provides age verification and signature services, the Maine law indirectly regulates carriers by potentially impacting the timeliness of deliveries. *Id.* at 79-80. The court exaggerates this impact, expressing concern that carriers

---

[18] Congress also exempted certain "State standard transportation practices" dealing with bills of lading and other credit rules. Pub. L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(3), now codified at 49 U.S.C. § 14501(c)(3). Later, Congress added an additional exemption for state regulation of tow rates. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899, codified at 49 U.S.C. § 14501(c)(2)(C).

will be required to make multiple delivery attempts, acquire a customer signature and examine customer identification. *Id.* at 79. However, even before the passage of Maine's tobacco delivery law, carriers such as United Parcel Service ("UPS") provided such services on any package if the shipper paid a nominal fee. *Id.* at 70. Nothing in Maine law requires nor prohibits carriers from offering these services; the law merely requires that shippers contract for such services when shipping tobacco products. The court admits to interpreting the preemption provision to have a "broad reach." *Id.* at 78-79. Indeed, the reach is so broad as to be illogical and certainly, in context, unreasonable.

Further, the First Circuit concluded that the second part of the Maine tobacco delivery law, the package labeling requirement, was preempted to the extent that it requires carriers to change "uniform package-processing procedures" to inspect all packages for tobacco markings and to segregate such packages. *Id.* at 81-82. As with the delivery requirements, the package-marking requirement of the Maine law is imposed not on carriers but on shippers, the carriers' customers. Nevertheless, the First Circuit speculated about the potential impact the requirement on shippers may have on carriers and found that potential impact sufficient to invoke the FAAAA preemption provision. Specifically, the court found that any deviation from the current package inspection process—a process that must vary by carrier, package size, type of delivery requested (*i.e.*, overnight, second-day, signature requirement, etc.), region of the country, stability of the package contents, and more—constitutes an unlawful infringement on carriers if adopted by a state or local government. Carriers such as UPS, however, already check packages for certain markings in many circumstances and had already adopted specific practices relating to packages

containing tobacco products.[19] In fact, in settlement of an enforcement action by the New York Attorney General, UPS agreed to "look for indications that a package contains cigarettes" before making any delivery. *Id.* at 73.[20] Thus, the First Circuit's conclusion that a package-labeling requirement presents an onerous, or even more than negligible, burden on carriers is without factual or logical support. That the court felt the need to articulate such a tenuous and unfounded basis for its decision demonstrates the inaccuracy of the court's ultimate decision on the preemption question.[21]

---

[19] The highly computerized nature of the common carrier business cuts against the speculation that the Maine labeling requirement would impose a burden on carriers. Such a high-tech business could readily adapt to this requirement. *See* Thomas Friedman, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY, *Flattener #8, Insourcing, What the Guys in the Funny Brown Shorts are Really Doing* 141-50 (2005) (explaining that if the Customs Service were to ask UPS to identify a package coming from a particular country and shipped by a person bearing a certain first or last name, UPS could readily do so—"When the package arrives for sorting, the UPS computers will then automatically route the package to a customs officer in the UPS hub. A computerized arm will literally slide it off the conveyor belt and dump it into a bin for a closer look. It makes the inspection process more efficient and does not interrupt the general flow of packages."). UPS takes pride in their high-tech system. *See* www.ups.com for public information about the company's process.

[20] A copy of the agreement can be found at http://www.oag.state.ny.us/press/2005/oct/9tiupsaodfinal.oct.pdf (last visited October 17, 2006). As that agreement details, UPS had already adopted certain practices regarding the shipment of tobacco products that deviate from the "uniform package-processing procedures." Similar settlements were reached with FedEx, *see* http://www.oag.state.ny.us/press/2006/feb/FedEx%20-%20Executed%20AOC.pdf (last visited October 17, 2006), and DHL, *see* http://www.oag.state.ny.us/press/2005/jul/dhlaogfinal.pdf (last visited October 17, 2006).

[21] Maine also has laws that restrict transportation of other dangerous products; those laws may be affected by the First Circuit's decision. *See, e.g.*, Me. Rev. Stat. Ann. tit. 28-A, §§ 2073, 2077 (liquor transportation);

Moreover, the First Circuit's unreasonably broad reading of the "related to" language of the FAAAA preemption provision threatens to undo the proper balance of state and federal authority in this area of public health. Historically, states have regulated youth access to tobacco by passing and enforcing laws designed to minimize tobacco sales and free distribution to youth. The federal government has not only condoned, but encouraged, such efforts.[22] And while Congress passed a law imposing reporting requirements on interstate shippers of tobacco products, 15 U.S.C §§ 375 to 378 (the "Jenkins Act"), that law essentially imposes enforcement responsibility on the states.[23] This federal deference to

---

Me. Rev. Stat. Ann. tit. 8, §§ 221 *et seq.*, (sale or transportation of fireworks); Me. Rev. Stat. Ann. tit. 17-A, § 1001(a)(B) (sale or transport of explosives).

[22] *See* 42 U.S.C. § 300x-26(b)(1) (requiring states to enforce youth access laws at the retail level); *see also* Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs,* Atlanta GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health (August 1999) (available at http://www.cdc.gov/tobacco/bestprac.htm) (last visited October 17, 2006). That the federal government has left to the states the responsibility for controlling youth access to tobacco is further demonstrated by the fact that the federal government has not established a minimum age for the use or possession of tobacco and, therefore, has no enforcement scheme to control youth access.

[23] Recognizing that it is state governments interested in regulating tobacco sales, the Jenkins Act requires that tobacco sellers who ship cigarettes across state lines report sales to the appropriate state tax authority. 15 U.S.C. §§ 375-378. It is fair to say that the federal government has invested no resources in enforcement of the Jenkins Act. *See* U.S. General Accounting Office, Report to Congressional Requestors, *Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement* (August 2002) (available at www.gao.gov/new.items/d20743.pdf) (last visited October 20, 2006). As this report explains, state governments have been active in indirect enforcement of

state government is subverted by the broad application of federal preemption curtailing the states' ability to control youth access to tobacco over the Internet. Nationwide application of the First Circuit's decision would be a blow to the states' ability to regulate Internet or mail-order tobacco sales, cutting against existing federal-state policy on tobacco control and allowing a real threat to the public health with respect to youth access to tobacco products. This Court has recognized this threat in the past, *see Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000), and, in the context of alcohol, has approved of state laws requiring adult signature verification and labeling instructions on packages. *Granholm v. Heald*, 544 U.S. 460, 490-91 (2005).

At least ten other states have passed laws similar to Maine's, requiring a retailer to use a carrier with age and signature verification upon delivery of tobacco products.[24] Those states include Virginia and Utah. Virginia's tobacco delivery law requires the retailer to use a delivery service that provides signature acceptance of delivery and proof of age through "a valid, government-issued identification" at delivery time. Va. Code Ann. § 18.2-246.10(2) (West 2004). Similarly, Utah allows mail-order tobacco sales if the retailer requires a "postal authority or other common carrier to," among other things, obtain a signature and verify the age of the person taking the delivery. Utah Code Ann. § 76-10-

---

the Jenkins Act, at least attempting to have an impact on Internet and mail order tobacco sales, while the federal government has taken no action.

[24] *See, e.g.*, Ariz. Rev. Stat. Ann. § 42-3225(A)(2) (West 2004); Del. Code. Ann. tit. 30, § 5365(a)(2) (West 2004); Ind. Code Ann. § 24-3-5-5(a) (West 2004); La. Rev. Stat. Ann. § 47:874(A)(2) (West 2004); Okla. Stat. Ann. tit. 68, § 317.4(A)(2) (West 2004); Or. Rev. Stat. Ann. § 323.718(1)(b) (West 2004); Tex. Health & Safety Code Ann. § 161.455(a)(2) (Vernon 2004); Utah Code Ann. § 76-10-105.1(3)(a) (West 2004); Va. Code Ann. § 18.2-246.10(2) (West 2004); W. Va. Code Ann. § 16-9E-4(a)(2) (West 2004).

105.1 (West 2004). Such provisions would be preempted under the First Circuit's interpretation of the FAAAA's preemption provisions. Many other states regulate youth access to tobacco via direct Internet delivery sales either by banning such sales[25] or by regulating retailers or carriers in some fashion[26] or both. Congress could not have intended to preempt these specific tobacco delivery laws through the general language of the FAAAA. The First Circuit's broad interpretation of the preemption language in the FAAAA threatens such state public health regulation.

Parental ability to control teenagers' Internet usage is minimal and a child can easily falsify his or her age online or over the telephone. By requiring retailers to choose carriers with age and adult signature verification, Maine and other states are utilizing an already existing apparatus, through delivery services such as UPS, to regulate the sale of tobacco to minors. Yet the First Circuit's decision will leave states with no practical means to prevent youth tobacco purchases over the Internet and telephone. Congress could not have intended this result when enacting the FAAAA as an economic regulation protecting common carriers.

---

[25] *See, e.g.*, N.Y. Pub. Health Law § 1399-ll (McKinney 2004); Md. Code Ann., Bus. Reg. § 16-223 (2004).

[26] *See, e.g.*, Alaska Stat. § 43.50.105 (Michie 2004); Cal. Bus. & Prof. Code § 22963 (West 2004); Conn. Gen. Stat. Ann. § 12-285c (West 2004); Idaho Code Ann. §§ 39-5701 to -5718; 720 Ill. Comp. Stat. Ann. §§ 678/5, -/10, -/99 (West 2004); Kan. Stat. Ann. § 79-3333 (2004); Mich. Comp. Laws Ann. § 205.431 (West 2004); Mo. Ann. Stat. §§ 407.925 to .932 (West 2004); Nev. Rev. Stat. Ann. § 202.24935 (West 2004); R.I. Gen. Laws. §§ 11-9-13.11 to -13.19 (2004); Tenn. Code Ann. § 39-17-1504(d) (West 2004); Wash. Rev. Code Ann. §§ 70.155.010, -.105, -.110 (West 2004).

B. States Should Be Allowed To Regulate Where the Federal Government Refuses To.

Both Congress and the judiciary acknowledge that states have the primary role in preventing youth access to tobacco. Congress, through the power to withhold spending from the states, conditions certain block grants for substance abuse on whether a state has made efforts to enforce under-18 tobacco laws. *See* 42 U.S.C. § 300x-26(b)(1) (providing that states will enforce their tobacco laws "in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18"). States are in the best position to implement and enforce such tobacco laws, and Congress indirectly demands as much from the states by conditioning federal funds on limited youth access.[27] An overly broad interpretation of federal preemption in the FAAAA runs counter to the federal mandate that states take action to reduce youth access to tobacco.

This Court and the Fourth Circuit have recognized the importance of the states' authority in this area. This Court recognized "established congressional policy that supports" state regulation of tobacco sales. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001). The Fourth Circuit noted the "clear congressional intent that States exercise their traditional police powers and take a primary role in attacking the problem of youth access to tobacco products." *Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155, 175 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000). To allow an unnecessary and overbroad interpretation of an unrelated federal statute to interfere with this long-standing

---

[27] Such federal demand also takes form as the "encouragement" of best practices at the state level that include comprehensive laws to address youth access to tobacco, *see* supra, note 22, and by requiring interstate shippers to report sales to state government authorities, *see* supra note 23 and accompanying text.

federal-state practice would do a disservice to significant public health efforts at controlling youth access to tobacco.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing technical assistance to public officials, health professionals, and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy organizations, voluntary health organizations, and others.[28] In addition, TCLC prepares legal briefs as *amicus curiae* in cases in which its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted *amicus* briefs in recent cases before the U.S. Supreme Court; the Supreme Courts of California, Delaware, Florida, Kentucky, Montana, and Washington; and the U.S. District Court for the District of Columbia.

Amicus the Campaign for Tobacco-Free Kids, a nonprofit corporation based in Washington, D.C., works to educate the public and policymakers about effective public and private

---

[28] TCLC's coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center (TALC) at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (TRC) at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center (TCRC) at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project (SFELP) at the Center for Social Gerontology in Ann Arbor, Michigan; the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey; and the Tobacco Public Policy Center at Capital University Law School in Columbus, Ohio.

sector policies to prevent and reduce tobacco use and its harms, and to advocate for the adoption of such policies, with a special focus on preventing and reducing tobacco use among youth. The Campaign for Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing tobacco use and its harms, especially among children. Among other activities, the Campaign has done education and advocacy work relating to Internet and mail order sales of tobacco products to kids articulating why such sales are harmful to state efforts to: 1) collect applicable taxes; 2) keep tobacco prices at high rates to discourage smoking, especially in youth; and 3) diminish the ready access to tobacco products for all consumers.

Amicus the American Lung Association ("ALA") is one of the nation's oldest voluntary health organizations, with volunteers and affiliates in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. ALA has nearly 400,000 volunteers. Since cigarette smoking is a major cause of chronic obstructive lung disease, ALA has long been active in research, education, and public policy advocacy on the adverse health effects of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades.

Amicus the American Cancer Society, Inc. ("ACS") has over three million volunteers nationwide, including 50,000 physicians. The organization's mission is to eliminate cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer, through research, education, advocacy, and service. The organization was founded in 1913, and since that time has conducted ground-breaking research in identifying the use of tobacco products as a major cause of cancer, and educating the public about its deadly effects. ACS strongly advocates for tobacco regu-

lation at all levels of government, including trying to ensure that children do not have access to this lethal product.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

MATTHEW MYERS *
Campaign for Tobacco-Free Kids
1400 Eye Street
Suite 1200
Washington, D.C. 20005
(202) 296-5469

* Counsel of Record

Counsel for Amicus Curiae